

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE  
COLUMBIA DIVISION

THOMAS E. NELSON,	)	
	)	
Plaintiff	)	
	)	No. 1:12-0015
v.	)	Judge Nixon/Brown
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant	)	

**TO: THE HONORABLE JOHN T. NIXON**

**REPORT AND RECOMMENDATION**

The Defendant has filed a motion in this case to dismiss for lack of subject matter jurisdiction because the complaint is untimely.

For the reasons stated below, the Magistrate Judge recommends that this motion be GRANTED and that this case be dismissed with prejudice.

**DISCUSSION**

The Plaintiff, with assistance of counsel, filed his complaint on January 26, 2012 (Docket Entry 1). The Defendant filed their motion to dismiss, along with a memorandum in support (Docket Entries 8 and 9) on April 13, 2012. They additionally filed the Declaration of Patrick J. Herbst, Chief of the Court Case Preparation Review Branch 3 Office of Disability Adjudication and Review Social Security Administration (Docket Entry 10), which was cited that the records of the Social Security Administration (SSA) reflected that Plaintiff received an adverse decision from the

Administrative Law Judge on his claim for disability on April 28, 2011, and that the Plaintiff requested a review of the decision. Their records further reflect that on November 16, 2011, he was notified by letter to both he and his counsel that his request for review was denied. They further advised that the Plaintiff had 60 days to file a civil action asking for court review in this matter and that the 60 days would be presumed to start five days after the date shown on the notice, unless the Plaintiff showed that he did not receive it within the five-day period (Docket Entry 10-2).

Mr. Herbst's affidavit continues to recite that as of the date he signed his affidavit on February 14, 2012, the Plaintiff had not requested an extension of time from the SSA to file a civil action.

The Defendant's memorandum cites that the 65-day time frame for filing this suit ran on January 20, 2012. They correctly point out that the Plaintiff did not file his complaint until January 26, 2012.

Unfortunately, despite Local Rule 7.01(b), which requires a response to motions within 14 days, the Plaintiff has failed to file a response to this motion. The Court, under the Local Rule 7.01(b), may take the motion as unopposed.

#### **LEGAL DISCUSSION**

Despite the lack of a response, the Magistrate Judge has reviewed the file to insure that there is a proper basis for the

motion. After such a review, the Magistrate Judge is satisfied that the Defendant has correctly stated the law and the facts in this case and that this case must be dismissed because the Plaintiff failed to file his request for review within the time allotted.

The Magistrate Judge adopts the Defendant's memorandum of law as accurate and will not repeat it.

#### **RECOMMENDATION**

For the reasons stated above, the Magistrate Judge recommends that this case be DISMISSED with prejudice as untimely.

Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has **14 days** from receipt of this Report and Recommendation in which to file any written objections to this Recommendation with the District Court. Any party opposing said objections shall have **14 days** from receipt of any objections filed in this Report in which to file any responses to said objections. Failure to file specific objections within **14 days** of receipt of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. *Thomas v. Arn*, 474 U.S. 140 106 S. Ct. 466, 88 L.Ed.2d 435 (1985), *Reh'g denied*, 474 U.S. 1111 (1986).

**ENTERED** this 3rd day of May, 2012.

/s/ Joe B. Brown  
JOE B. BROWN  
United States Magistrate Judge